baliknya haruslah juga dilihat. Di dalam kes saya sendiri, *Malayan Banking Bhd* lwn *Lim Chee Leng*,[2] Mahkamah Agung telah memutuskan sebaliknya bahawa permohonan itu tidak perlu kerana writ itu sendiri bertindak sebagai permohonan. Kes *Mok Hin Wah*[1] di atas malangnya tidak mengkaji prinsip undang-undang yang diputuskan oleh *Malayan Banking Bhd* lwn *Lim Chee Leng*[2] tersebut. Bagaimanapun, adalah kaedah amalan yang tidak asing lagi, bahawa perlulah bagi pihak defendan membangkitkan bantahan terhadap kegagalan plaintif membuat permohonan itu di dalam kenyataan pembelaan atau afidavitnya, tetapi ini telah tidak dilakukan.

Saya memutuskan bahawa penghakiman dijatuhkan terhadap defendan kedua dan keempat dengan bayaran kos. Saya juga memutuskan bahawa faedah dikenakan sebanyak 8% dari tarikh kes ini difail hingga ia dijelaskan.

Tuntutan plaintif dibenarkan.

Peguam: *Abdul Ghani & Co*; *Skrine & Co.*

Dilapurkan oleh *Prof Ahmad Ibrahim*

Algemene Bank Nederland NV v Kace Advertising Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) - CIVIL SUIT NO C2964 OF 1984
VC GEORGE J
22 APRIL 1989

Banking - Guarantee - Whether company had knowledge of loan credited to account - Whether knowledge of guarantors of loan essential - Construction of guarantee - Liability for all sums due at any time anywhere on any account

The plaintiff made a loan to the first defendant under the Small Loans Scheme ('SLS') sponsored by the government, and was secured by guarantees executed by the second, third and fourth defendants. The plaintiff applied under O 14 and O 18 r 19 to enter judgment against all the defendants. The first defendant denied entering into a contract to borrow and contended that it had no knowledge of the same. Alternatively, they contended that the bank had failed to comply with the rules and regulations of the SLS and since the first defendant had not accepted the loan scheme, the claim was untenable and unenforceable. The other defendants contended that the amount owing on the overdraft for which they had agreed to indemnify the bank, was completely paid and settled in May 1982, when the sum of $30,000 under the SLS was credited to the first defendant's account and subsequently overdrawn. Further, they contended that the guarantee given did not cover the loan under the SLS that was credited to the overdraft account.

Held, allowing the plaintiff's appeal:

(1) It is undisputed or cannot be disputed that the first defendant had been banking with the plaintiff for a number of years and had successfully applied for various banking facilities. The first defendant had formally applied for a loan under the SLS on 21 August 1981 and their account was credited with the $30,000 on 7 May 1982, reducing the debit balance in the account. The suggestion that the first defendant was not aware of the approval of the SLS loan was unacceptable as they must have been aware that the account was overdrawn and the crediting of $30,000 could not have escaped their notice. The other defendants had conceded that the account was credited with the $30,000 loan and directors, being the alter ego of the company, their knowledge is the knowledge of the company.

(2) The other defendants who were also the directors of the first defendant had, under the letter of guarantee, agreed to pay on demand all amounts owing by the first defendant at any time anywhere on any account. Their contention that the guarantee was only in respect of one particular account is inconsistent with cl 1 of the guarantee. The suggestion that they were unaware of the application for the loan is unacceptable as they were the directors and must be deemed to know what the company was doing. In any event, their lack of knowledge of the loan does not do away with their obligation to pay on demand all sums of money which are due at any time owing to the bank anywhere on any account whatsoever.

Liza Chan (Ms) for the plaintiff.
Kan Weng Hin for the first defendant.
Belinda Tan (Ms) for the second, third and fourth defendants.

Cur Adv Vult

VC George J: The plaintiff bank's claim against the first defendant as stated in the statement of claim is for 'the sum of $31,841.06 as at 29 February 1984 with interest thereon at 7.5% till date of settlement being in respect of 'SLS loan' facility of $30,000 granted to the first defendant, full particulars of which are within the first defendant's knowledge'. The claim against the second, third and fourth defendants is as guarantors 'of all sums due and owing by the first defendant to the bank'. 'SLS' has reference to what is known as the Small Loans Scheme sponsored by the government by which banks are allowed to lend money at rates of interest very much less than the prevalent rate of interest in ordinary bank loans.

The first defendant, by its statement of defence, denies having entered into any contract to borrow $30,000 from the plaintiff, and contends that it has no knowledge of the particulars of the alleged loan. By an amended statement of defence, the first defendant pleads, in the alternative, to the effect that even if the bank had disbursed such a loan to the plaintiffs, there was failure on the part of the bank to comply with the rules and regulations of the SLS loan scheme and that in any event the first defendant had not accepted the loan scheme and that accordingly the claim is untenable and is unenforceable.

The second, third and fourth defendants also delivered a statement of defence. They say that they did agree to indemnify the bank in respect of overdraft facilities the bank had extended to the first defendant 'and nothing further'. They contend that the amount owing on the overdraft operated under a current account was completely paid and settled on the 7 May 1982 when the

$30,000 given as a small loan under the SLS, sponsored by the government, was credited to the first defendant's current account. They contend that thereafter the overdraft facility was withdrawn. They contend that the guarantee given by them did not and does not cover the loan granted to the first defendant under the SLS that was credited to the first defendant's overdraft account.

The bank took out what appears to be O 14 and O 18 r 19 proceedings against all the defendants. An assistant manager of the bank, Mr Kevin Suit, in a supporting affidavit contended that the bank had at various times granted to the first defendant various banking facilities including the overdraft facility enjoyed and operated under the current account. He pointed out that the second, third and fourth defendants had, by their letter of guarantee dated 14 August 1981, a copy of which he exhibited, guaranteed 'to pay and satisfy to the plaintiff on demand all sums of money which are now or shall at any time be owing to the plaintiff anywhere on any account withdrawn by the first defendant'.

Mr Suit went on to point out that it was the first defendant who, in August 1981, had applied for the loan of $30,000 under the SLS, which application was eventually approved. The $30,000, on its being released, was credited to the first defendant's current account. It was a loan from the plaintiff to the first defendant. Apparently the interest payable by the first defendant on the overdraft facility enjoyed on the current account was some 14.25% pa as opposed to 7.5% on the loan of $30,000 on the SLS. It would seem that with the $30,000 being made available, the amount overdrawn on the current account of the first defendant with the bank which was numbered 1266853 was reduced by $30,000. The first defendant, however, was debited the $30,000 under another account which is a loan account, namely, account no 1279120.

The second defendant, who was the managing director of the first defendant, by affidavit, concedes that it was the first defendant who had applied for the SLS loan of $30,000. He says that the first defendant had never been informed of the approval of the application and that accordingly, he contends, it cannot be said that the first defendant had accepted the loan and that there was accordingly no contract of loan in respect of the $30,000 under the SLS. He says that the guarantee was in respect of overdraft account no 1266853 only which was 'unilaterally cancelled by the plaintiffs as on 7 May 1982'. The loan account no 1279120, according to the second defendant, was established by the bank without his knowledge and without the approval of the first defendant. He also contends that the application for the loan under the SLS was made by the first defendant without the knowledge of the second, third and fourth defendants. (I pause to note that this is indeed odd considering that according to a letter also exhibited by the second defendant, the second, third and fourth defendants were at all relevant times directors of the first defendant and he himself was the managing director.) The second defendant goes on to contend that the overdraft facility in account no 1266853 having been 'cancelled', the guarantors were thereby released from their guarantee.

Mr Kevin Suit, in a further affidavit in reply to the various affidavits of the second defendant, says that the first defendant was furnished with statements of accounts from time to time. He exhibited copies of the same which included the statement in respect of account no 1266853 as on 17 February 1984 when the account showed a nil balance and the May 1982 statement in respect of account no 1297120 showing the debiting of the account with $30,000 on 7 May 1982. The corresponding statement in respect of account no 1266853 shows as on 7 May 1982 the crediting of the account with $30,000.

It is undisputed or cannot be disputed:

(i) that the first defendant had been banking with the plaintiff for a number of years and had successfully applied for the various banking facilities set out in its application letter dated 15 June 1981, exh FKS-1 to encl 17;

(ii) that the first defendant provided the bank with a letter of guarantee dated 14 August 1981 executed by its directors, the second, third and fourth defendants, the consideration for the guarantee being the bank making or continuing to make advances or otherwise giving credit ... to the first defendant;

(iii) that, inter alia, one facility provided by the bank to the first defendant by way of giving credit or making advances was allowing it to enjoy an overdraft facility in respect of its current account no 1266853 with the bank up to $30,000. In fact the account was overdrawn by $30,996.50 as at 30 April 1982 and by 6 May 1982, it was overdrawn by $43,837.94;

(iv) that it was the first defendant who, by application dated 21 August 1981, formally applied to the plaintiff under the SLS for a loan of $30,000;

(v) that the bank balances of the first defendant in respect of account no 1266853 showed, most of the time, a credit balance. On the few instances that a debit balance was shown, it was generally for very small amounts, and if the debit balance went above $10,000, the account, was brought into credit without delay. This state of affairs went on until April and May 1982 when the account was overdrawn and was kept overdrawn and over the limit of $30,000 until the said payment of $30,000 into it on 7 May 1982;

(vi) that under the overdraft facilities enjoyed under account no 1266853, interest payable was some 14.25% pa. Under the SLS, interest payable was only 7.5% pa; and

(vii) that in cl 1 of the letter of guarantee, there was the provision that the guarantors would pay on demand all amounts owing by the first defendant to the plaintiff at any time anywhere on any account whatsoever.

The suggestion that the first defendant was not aware of the approval of the application under the SLS is unacceptable. As has been seen, the first defendant's account was overdrawn beyond the limit of $30,000, which state of the account surely must, and in any event has to be deemed to, have been known by the first defendant. Even assuming that the bank had not formally notified the first defendant of the approval of the application, the crediting of the current account with the $30,000 could not have escaped the notice of the first defendant. The bank's transaction code for the item is 10 which has reference to 'local funds transfer', according to the 'explanation of code numbers' that Cik Lisa Chan drew my attention to.

Encik Kan suggested that the $30,000 could have been a payment by one of the first defendant's customers. It is unlikely that such a payment would be a code 10 transaction. In any event, it was for the defendants to show the source of the $30,000 being other than the SLS loan that the plaintiff has proved it to be by exhibiting the application, the crediting of the account and the debiting of the amount in the loan account. Further, the second, third and fourth defendants have, by their statement of defence, conceded that the overdraft account of the first defendant was credited with the $30,000 loan from the SLS. The knowledge of the directors of a company, who are the alter ego of the company, is the knowledge of the company. Having utilized the $30,000, the first defendant's contention that it had no knowledge of the approval of the loan or that it had not accepted it is completely devoid of merit and has to be and is rejected. The contention that, in any event, the bank had not adhered to the rules and regulations of the SLS was not developed and I assume that that line was abandoned.

As to the guarantors, cl 1 of the letter of guarantee clearly covers the SLS loan. The contention that their guarantee was only in respect of account no 1266853 is inconsistent with the said cl 1. The guarantors were at all relevant times the directors of the first defendant and should have known that in the event the SLS loan was obtained, it was an amount that would be owing to the bank, and as such would be within the terms of their letter of guarantee. The suggestion by the second defendant that the second, third and fourth defendants were not aware of the application for the SLS loan is unacceptable. It was the second defendant himself, as managing director, who implemented the application for the loan and the third and fourth defendants, as directors of the company, must be deemed to know what the first defendant company was doing, certainly in respect of its financial affairs.

In any event, by the terms of the guarantee, their lack of knowledge of the successful application for the SLS loan does not do away with their obligation to pay on demand 'all sums of money which are now or shall *at any time* be owing to the bank *anywhere on any account whatsoever* ...' (emphasis provided).

The appeal had to be and was allowed with costs. The plaintiff bank was given leave to enter final judgment as prayed in prayer (a) of the summons encl 12.

Appeal allowed.

Solicitors: *Yip Yeo & Nasrim; CH Liew & Co; Gill & Tang.*

Reported by *Yap Shao Sin*

Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd

HIGH COURT (PENANG) - BANKRUPTCY NO 29(43)-337-88
EDGAR JOSEPH JR J
11 AUGUST 1989

Bankruptcy - Bankruptcy notice - Whether leave to issue execution necessary - Date of commencement of bankruptcy proceedings - Whether it was date of issue of bankruptcy notice or date of service thereof - Sum specified in bankruptcy notice in excess of sum actually due - Whether a mere irregularity - Whether amount claimed specified - Whether proceedings commenced in the correct state - Jurisdiction - Costs of other bankruptcy proceedings not paid - Costs not taxed yet - Bankruptcy Act 1967, ss 3(1)(i) & 131 - Bankruptcy Rules 1969, rr 101(2), 109(1) & 276 - Rules of the High Court 1980, O 46 r 2(1)

Civil Procedure - Execution - Leave to issue execution more than six years after judgment - Whether such leave necessary in bankruptcy proceedings - Bankruptcy Act 1967, s 3(1)(i) - Bankruptcy Rules 1969, r 276 - Rules of the High Court 1980, O 46 r 2(1)

Statutory Interpretation - Conflict between principal legislation and subsidiary legislation - Principle applicable - Bankruptcy Act 1967, s 3(1)(i) - Bankruptcy Rules 1969, r 276

In this case, a judgment debtor sought to impugn a bankruptcy notice on a number of grounds. The bankruptcy notice was founded on a judgment debt which came into existence on 13 May 1982. The bankruptcy notice was issued on 12 May 1988 and served on the judgment debtor on 9 June 1988. It was contended that the proceedings in bankruptcy had been commenced more than six years after judgment had been recovered without the leave of the court as required under O 46 r 2(1) of the Rules of the High Court 1980. It was contended for the judgment creditor that as r 276 of the Bankruptcy Rules 1969 excluded the application of the Rules of the High Court 1980 to bankruptcy proceedings, no such leave was required. The second point taken for the judgment debtor was that the bankruptcy notice included interest not recoverable under s 6(3) of the Limitation Act 1956 which provided that no arrears of interest in respect of any judgment debt shall be recoverable after the expiration of six